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THE FAITHLESS ELECTOR: A CONTRACTS PROBLEM*

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Availing myself of the marvelous freedom of this format, I am going to put an idea down here, as briefly as possible. I do not know whether this idea has been expressed by anyone else before. If it has, it cannot hurt for it to get another exposure; if it has not, it certainly should be put forward well before 1980.

Our electoral college system for electing the President sometimes generates the problem of the "faithless elector"—the elector who runs as a member of a slate pledged to vote for a particular candidate, but who casts his vote for somebody else.

I happened to be around Congress and in the galleries when this question came up in January, 1969.[1] One Dr. Bailey, an elector in North Carolina, was pledged to Richard Nixon but voted for George Wallace. The Congress faithfully followed the stage directions in 3 U.S.C. §§ 15-17.[2] When North Carolina was reached, and the problem of Dr. Bailey was raised, the Houses dissolved their joint session and each met separately (without any further time for research or preparation) for the two hours, and not a minute more, mandated by section 17,[3] with each member limited to a single five minutes' speech. After this deliberation, if so hectically hurried a "debate" can be called that, each House voted to receive Dr. Bailey's vote as cast, and to count it for Wallace. Reconvening together, they acted accordingly.

This amount of consideration, for a great constitutional question whose solution might determine the identity of the President, could not be thought to rise to the level of frivolity—except for the fact that in the given case Nixon won no matter how you counted Bailey's vote. (My friend, Congressman Bob Eckhardt, said the most sensible thing said on this occasion—in effect that the job of Congress was not to adjudicate issues of

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1. *See* 115 CONG. REC. 145-72, 197-246 (1969).

2. 3 U.S.C. §§ 15-17 (1970). These sections provide for a joint session of the Senate and House of Representatives to count electoral votes. If at least one Senator *and* one Representative should object to a particular elector's vote, each house shall meet separately to rule on the objection; unless *both* houses vote to reject the contested vote, it is counted as cast.

3. *Id.* § 17.

no present pragmatic relevance, but to decide who had been elected President, and that Congress should simply have left the "faithless elector" question where it was and declared Nixon to be elected no matter how Bailey's vote was counted.[4])

I decline to believe that such perfunctory consideration of a question, the answer to which made no difference at the time, could determine for all time the right answer to that question when its answer *does* make all the difference, as sometime it easily may. So I have kept thinking, off and on, about the matter.

It struck me the other day—and this is the whole of my idea for this piece—that the problem of the "faithless elector" is a problem, primarily, not of constitutional law but of contract law.

The law of contract is after all the law we customarily think of when we consider what to do about broken promises. If there are firm evidentiary grounds for holding that an elector has made an express or implied-in-fact promise to vote for X (and if there are not the problem cannot arise), and if voters have voted for him in reliance on that promise, then it seems to me that a contract, with valuable and lawful consideration, has been made between him and them, the tenor of which is that he will perform a single, simple act, of a unique value not commensurable with money. This contract falls within familiar categories: It is (as my description of it makes clear) a classic case for the equitable remedy of specific performance; how could the "remedy at law" (money damages) be "adequate"? It is, quite clearly, a third-party beneficiary contract, with the candidate in the role of beneficiary, and modern contracts law generally acknowledges the right of such a beneficiary.

The only substantive question remaining is whether such a contract is "against public policy," and hence void. At this point, of course, we reach a facet of confrontation between contracts law and constitutional law. But how transformed is the constitutional question! The question is not now whether article II of the Constitution,[5] in and of itself, compels

4. 115 CONG. REC. 164 (1969).

5. U.S. CONST. art. II § 1 provides, in pertinent part:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .
>
> The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to

the elector to keep his promise, or frees him to break it. The question is rather (and in stating it fairly I think I virtually answer it) whether a promise of a sort *not forbidden* by article II, and regularly made and kept by electors in every article II election for the last century and a half at least, is "against public policy," so as to be unenforceable, notwithstanding its meeting all technical requirements of contract law. I do think that question pretty well answers itself; certainly I can think of no better way to argue it than merely to state it.

There remain questions of procedure for enforcement of this contract. I would hope that it will not be thought recourse must be had to a court. The Houses of Congress are already the judges of the validity and effect of certificates from the components of the electoral college. In that capacity, Congress should, when needful, have those simple powers of a court of equity which would suffice in this situation—the power to reform an instrument to conform to legal obligation, the power to order the execution of an instrument in furtherance of legal obligation, and (overarching both of these remedies) the general equitable power to treat that as done which ought to be done.

None of the foregoing seems to me in the least doubtful, as the law now stands. But it might be as well to codify it all in a revision of title 3, so that it could all roll off automatically if the problem of the "faithless elector" visits us again. The next time, the solution to the problem could determine the identity of the President. Since the people would hardly stand for a person's being President who became President because Congress considered itself impotent to give effect to a plainly implied-in-fact contract, it might be as well to say so at once, in a title 3 revision declaratory of the applicability, to this problem, of simple contract law and remedies. No constitutional amendment would be necessary.

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the President of the Senate. The President of the Senate shall, in the Presence of the Senate and the House of Representatives, open all the Certificates, and the Votes shall then be counted. . . .

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same thoughout the United States.

The twelfth amendment, adopted in 1804 to modify article II insofar as the election of the Vice President was concerned, left the above provisions intact.